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In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of GEORGE E. TILTON, Bankrupt.

GEORGE E. TILTON, Appellant

vs.

ANNA J. HELMS, ELIZABETH KEELAN, MAGDA OLSON, REBECCA S. KNIGHT, R. BLIX, FRANCES BLIX, CHRISTINA WADMAN, J. J. MIDDAL, J. STARUP, ANNA C. ADAMS, JESSIE HUMPHREY, ALICE SAXON and RUTH SAXON, Appellees

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Petition for Rehearing

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Petition for Rehearing

By the grace of the court in extending the time up to and including January 20th, 1925, we are filing this petition for rehearing on behalf of the

appellees. Although not originally of counsel of record in this case, counsel of record having withdrawn as shown by the files herein, we ask the court's indulgence for taking the liberty of presenting this petition, but we do so because we firmly believe, after reading the Transcript of Record, Briefs, and Opinion that the court has reached a conclusion which is not justified or warranted by the facts and the law submitted, and an injustice, it seems to us, has unconsciously been done to the appellees. We are reliably informed, and we repeat it as hearsay, that appellees were not represented before this court at the oral argument on November 24th last, by their counsel, although they had arranged to have him present. While we feel confident that this did not imply to this honorable court an abandonment of their position, or an admission of the weakness of their case, yet in view of the fact that the opinion was handed down twenty-one days after the oral argument was made by counsel for appellant, it is possible that with the heavy calendar of the last term and the large number of cases argued and submited, some haste has been shown, and perhaps some vital testimony in this case has been overlooked.

Inasmuch as this is a case with no well defined principles of law or precedent governing its facts, and that it is to become a precedent binding in future cases, we feel a re-argument should be had and a re-examination of the record should be made, so as to determine if the conclusion of the court really fits the facts as they really exist. It is a case of first impression so far as this court is concerned, and from our thorough investigation we have not been able to discover in text books or adjudicated cases in bankruptcy proceedings, that there has been submitted, any case presenting exactly or with reasonable exactness the facts which this one does, to any court in this country.

While it is true, as the opinion states, that the bankrupt obtained from Anna J. Helms during 1919 sums aggregating $6,300.00 in exchange for receipts specifying they were for loan purposes to be loaned and returned six months from date, plus interest, it must not be lost sight of that the last receipts, being renewals, were dated October 20th, 1920, October 12th, 1920, September 20th, 1920, November 8th, 1920, November 1st, 1920, and November 11th, 1920, each in the sum of $500.00, and one September 16th, 1920, in the sum of $300.00. (Tr. 6.) These receipts are the ones the objecting

creditors now claim were "materially false statements in writing, which the bankrupt made for the purpose of obtaining credit" from Anna J. Helms, the last being less than six months prior to the time that the bankrupt made an assignment for the benefit of his creditors, and less than seven months before he was adjudicated bankrupt.

Mrs. Helms testified she was an egg candler, and had been a widow for eleven years. While she said she loaned the bankrupt some money her language must be taken in connection with the manner in which it would be used by persons of her sex and business experience. There can be no question but that she understood both from the bankrupt and the language of the receipts given her by him that the bankrupt was to loan said money for her in the usual way that an agent or broker loans money of his principal, to-wit, by having the papers in her name. No other interpretation could be contended for that receipt as supported by her testimony. This court admits the relationship of the bankrupt to the owners of the moneys was that of an agent towards his principals. The bankrupt had been represented to her as a loan agent, he told her he loaned money and always loaned it out on good

security, taking only one-third the valuation so she let him have the $1,000.00, with interest at 10 per cent; that he said he was always careful over his loans; that he gave her a receipt for $1,000.00, and that altogether in 1919, she loaned him $6,000.00 (should be $6,300.00), drawing out $2,000.00, leaving $4,300.00 not returned. The $1,000.00 receipts were exchanged into $500.00 receipts, the bankrupt saying he could handle them better in $500.00. Interest payments were kept up regularly until the bankruptcy when he told her he was broke. It was agreed the receipts of September, October and November, 1920, were renewals of the original loans made in 1919. (Tr. 7, 8,)

In September, 1919, Mrs. Helms said the bankrupt took her out to show her some securities and on returning to the office she gave him a check for $300.00 to loan on the houseboat; she took no security for the $300.00 so far as she knew and he gave her nothing but a receipt; that after he was broke he stated he had used the money personally, placed it in a general fund and used it for his own personal use, and desired to change the receipt into promissory notes and $110.00 had been paid upon the notes; that she would not have loaned the money if she had known the bankrupt was going

to put it into his own use. She never examined any property for any loan except the $300.00 on the piano and the houseboat; she never asked the bankrupt to show her any property; she never satisfied a note or mortgage, nor did she make any inquiry if mortgage was taken in her name. (Tr. 8, 9, 10.)

Of the money of Elizabeth Keelan, $300.00 was loaned for the first time on October 11th, 1920, and again on November 24th, 1920, $200.00 was loaned, and the bankrupt gave her the same form of receipts as those given Mrs. Helms. (Tr. 6, 7.) The bankrupt also told her he was a loan agent and never let out any money except on good security and at one-third of the value; that shortly after the loan the bankrupt desired to change the receipts into notes; that she would not have loaned the money if she had known he was going to apply it to his own use. (Tr. 10, 11.)

Confronted with these receipts and the testimony introduced in connection with their issuance, the lower court denied the bankrupt his discharge under Section 14b (3) Chapter III of the Bankruptcy Act as amended in 1910. Both of these objecting creditors testified the money was advanced to the bankrupt for the purpose of placing same in loans and that had they known he was going to put it to his own

use they would not have loaned the money. It must be borne in mind that the bankrupt was not dealing with persons who were accustomed with the manner of doing business as it was done in the business world between principal and agent or broker in loaning money, and for that reason they should not be held to the strict rule in the interpretation of language that is applied to persons constantly engaged in that business.

The bankrupt on his direct examination testified he never told Mrs. Helms he would take her money and loan it for her, in spite of the written evidence against him in the form of the receipts; that he borrowed from her with the understanding that he should use it in his business, and that he was making loans and that money was coming in constantly, and if she would give him reasonable time, a week or two, when she wanted money back, he would always meet it. There were two or three occasions when she did come in and when he paid in advance. He took the money and loaned it in his name, it was loaned to him and he reloaned it. Nothing was said to her about guaranteeing her the loan would be paid, the money was borrowed and he agreed to pay it at the time specified. Relative to the houseboat loan he was going out on a

trip and took her along, and the $300.00 was loaned before they started and not after they came back. In addition to making loans he was in the logging business and had charge of a building and loan association, and at the time the loans were made he did not know he was in failing circumstances, and he ascertained that fact in the latter part of January, 1921, which by the way was only about two months after he had taken Miss Keelan's money, and given her the receipts, and a little over two months since he had done the same thing with Mrs. Helms by giving her the renewal receipts.

Originally Mrs. Helms had objected to the form of receipt, and he agreed to give her notes, but she said it did not make any difference. In January, however, he became alarmed, as his testimony shows, because these receipts were outstanding, as some of his creditors had suggested they might make him liable as a trust proposition and he said he did not understand them that way, that he handled them as notes, thousands of dollars in that way, and he wanted the legal evidence of this indebtedness put in the form which he and his creditors always understood it to be; other creditors had objected to the receipts and he had changed them into notes. He stated to Mrs. Helms the money was

loaned direct to him, and he wanted it put back on the basis of a straight loan. This was in January, 1921. He never told her he had lost everything and she was stuck, but did tell her he was seriously embarrassed and he was stuck. (Tr. 11, 12, 13.)

On cross-examination he testified he had been admitted to the bar eighteen or twenty years ago, but never practiced, and he was an officer of Prudential Savings & Loan Association; that the money loaned by Mrs. Helms and the other creditors in her position was actually used in chattel loans on personal property, principally, perhaps on some real property; that he never used any of the Helms money in his own personal business ventures, and it went into chattel loans, and his books would show he lost some $29,000.00 on chattel loans. His books do not show, and never did, that any money which he loaned belonged to any particular individual, because he was not loaning for any particular individual, but always loaned the money in his own name. It was a loan to him. That is the way he understood it at the time. He had carried on his own business transactions in this manner for a great many years. (Tr. 13, 14.)

He further testified he was to pay Miss Keelan 10 per cent interest, he loaned money out on chattel

loans, was paid 10 per cent and also certain fees for services; he never represented he was acting as agent for other parties; the people to whom he made loans understood they were dealing with him alone; he did loan money with real property as security but the bulk of loans were on personal property, he generally acted as his own appraiser and the mortgages and bills of sale were given to him. (Tr. 14.)

From the testimony of these two objecting creditors it would seem that Miss Keelan's situation is a little different from that of Mrs. Helms. The latter had been dealing with the bankrupt since 1919, and was taking renewal receipts from time to time, the last of said receipts being as late as November 11th, 1920. Miss Keelan commenced to deal with him in October, 1920, making one payment of $300.00 to him at that time, followed by another $200.00 on November 24th, 1920, and so far as the record shows she never received any interest whatever from him, as he made an assignment for the benefit of his creditors in less than six months from the date she gave him her last money and took the receipt. There is a direct conflict in the evidence of Mrs. Helms and Miss Keelan on the one hand and the evidence of the bankrupt on the other, but we believe an examination of the

respective testimony in the light of the surrounding circumstances will show that the testimony of the two objectors is in harmony, and one corroborates the other, while the testimony of the bankrupt stands alone.

Even assuming for the sake of the argument that the court is right in overruling the objections of Mrs. Helms, this should not dispose of those filed by Miss Keelan. The bankrupt did not testify to any conversation had with Miss Keelan different from the agreement mentioned in the receipts given her, no interest was paid her, and no notes were given her in exchange for her receipts at any time. The bankrupt wanted to change the receipts into notes, but she would not have loaned the money if she had known he was going to apply it to his own use. He testified to an understanding with Mrs. Helms, which is denied by her, that he should use her money in his business, but no such conversation was had with Miss Keelan according to his testimony.

After stating the facts somewhat briefly as they affected Mrs. Helms' right, and adding that Miss Keelan's case was generally similar, the opinion states that "Tilton's relationship to the owners of

the moneys became that of an agent towards his principals." With this statement we are heartily in accord, but we respectfully disagree with the conclusions drawn therefrom. By the receipts or statements delivered to the objecting creditors, Helms and Keelan, he represented the moneys turned over to him were for loan purposes, to be loaned and returned. At the time he gave the last receipts to Mrs. Helms he still wanted her to believe that her money was in loans and had been loaned, as he was giving her the renewal receipts upon that basis. He knew at that time the money was not in loans but was in his general account and was being manipulated by him for his own use, drawing 10 per cent interest, and he being paid certain fees for services. The proper inference to be drawn from his testimony is, that he was making loans which to say the least were questionable, otherwise they would not draw 10 per cent interest and pay certain fees, and it would be interesting to know what his fees amounted to. It would seem that the money was loaned principally for those fees, and the bankrupt well knew that the parties who advanced him money upon such receipts would never have loaned him any money had they known how he manipulated the same for his own benefit.

He represented to them by his receipts the money was advanced for loan purposes to be loaned and returned, and as a financial agent and attorney at law he knew that he was going to use their money and was then using it, in a way different from that which he had led them to believe it would be used. Instead of using this money as an honorable business man and agent would do in taking care of the hard-earned savings of women entrusted to him for investment in reliance upon the statements contained in the receipts and orally, he uses and handles it as his own money. If the statements made by the bankrupt, in said receipts, do not come within the meaning of Section 14b (3) of the Bankruptcy Act Chapter III as amended in 1910, then we do not know what such a statement might consist of. As this court has said, Tilton agreed in said receipts to use the money for loan purposes for the benefit of the lenders, the sums to be returned, thus establishing the relation of principal and agent between the parties, but he then turns around and uses the money which had been given him, in reliance upon a statement in writing, in a way different from his representations in said receipts. When he gave the last receipts to Mrs. Helms the money was not then loaned for Mrs.

Helms' benefit. The money of both objecting creditors, as well as others similarly situated, was advanced to him upon his promise that it would be used for loan purposes to be loaned and returned and for no other purpose, and still he says he never told Mrs. Helms he would take her money and loan it for her. He admits he had not and did not use the money in accordance with the receipts and the statements made therein. If it is true he told Mrs. Helms the money was loaned to him, why lead her to rest in the belief that her money was being used for loan purposes for her benefit? Why continue to give her such forms of receipts except for the purpose of keeping her money and to deceive her? Why not give her a receipt for the money in his own name without specifying that it was for any purpose, except to draw interest, payable at specific times, inasmuch as he was in the loaning business? The only construction that can be placed upon said receipts is that they were made for the sole purpose of making Mrs. Helms and Miss Keelan believe their money would be placed in loans for their benefit, and no matter what would happen to Tilton they would be safe. It is all right for the bankrupt now to claim that Mrs. Helms never satisfied a note or mortgage, and that she made no inquiry

if mortgages were in her name. Mrs. Helms understood the duties of an egg candler, but when it came to loaning her money out at interest, she came to a man who had been recommended to her and who had recommended himself to her for that purpose, and she dealt with him as her agent or broker in putting out her money, and protected herself by the statement in her receipts, both original and renewals, that the money would be handled upon the basis of the statements made to her in writing.

Miss Keelan was not asked if she ever satisfied a note or mortgage, or if mortgage was taken in her own name, because she could certainly rely upon the statements of her receipt, an interest date not having rolled around, that her agent was looking after her interests in accordance with the terms of the written statements. At the time he gave her the receipts, perhaps as the court says, no particular loans were contemplated by the lenders, and that Tilton, who carried on a loaning business, could use his discretion in honestly making loans subject to the requirements of his receipts to his principals, plus the prescribed interest. Is not this, we ask, the way in which all money is entrusted to agents or brokers for the purpose of making loans? We agree that no particular loans were contem-

plated, but the money was to be used for loans as applied for by prospective applicants, and it is fair to infer that the six months' period was inserted in order that the investors might keep in touch with their investments as made by their agent, but instead of turning the money back, the agent issued renewal receipts in smaller amounts in the same language as the prior ones. No doubt these loans were short loans and this was the object of a six months' accounting. Under the receipts and the testimony in support thereof it was Tilton's duty to keep the money entrusted to him for investment in loans in favor of his clients, and they were relying upon him as to the method which they should follow, and this could be the only inducement which prompted these objecting creditors to invest moneys through him by taking these receipts and statements.

The court admits in its opinion that although Mrs. Helms' version of the circumstances connected with the $300.00 receipt conflicts with that of Tilton, if the facts were as she gave them, the reasonable inference is that Tilton obtained the $300.00 by a materially false statement in writing made with intent to deceive. This rule would apply also to the renewal receipts afterwards issued. The

situation up to the time the last renewal receipt was issued had not changed. The houseboat transaction was the basis of the subsequent transactions and the issuance of further receipts, and we can not see why the court should accept the testimony of the bankrupt as true and brand that of Mrs. Helms as untrue, especially when she has the support of a writing containing statements made for the purpose of retaining the money intrusted to him for investment purposes as originally agreed upon.

In conclusion the court says:

"Considering all the circumstances together, we think the evidence against his application for discharge is not of that strength and convincing character that the law requires as ground for denial of discharge in bankruptcy."

In this connection, we refer the court to the rule announced in *Re Arenson*, 195 Fed. 609, 613, which seems to us to fit this case:

"While the burden of proof is upon the objecting creditor to establish the cause which he claims bars a discharge, yet, when such creditor shows that a material statement was known to be untrue when it was made, the burden of proof shifts to the bankrupt to show that it was not made with intent to deceive. This burden the bankrupt has not met.

His disclaimer of any purpose to deceive lacks any corroboration. It is a defense at the command of any one, and, in the absence of corroborating circumstances, is entitled to little weight."

Although not a case involving relations between a bankrupt and his objecting creditors, the language used by our Supreme Court in the case of *Landis v. Wintermute*, 40 Wash. 673, 679, is pertinent upon the relations between the bankrupt in the instant case and his objecting creditors:

"One who acts * * * as an agent for a principal, should not only be absolutely honest, but should use the utmost effort to make the dealings fair, frank, and honorable; and this is especially true in dealing with one inexperienced or otherwise incapable of self-protection. And in transactions between * * * principals and confidential agents, courts will not be astute to find or recognize technicalities and subtle distinctions by means of which such * * * agents may escape the responsibilities resting upon them. The fact that the past transactions of the parties have been such as to awaken in the one a feeling of confidence and trust toward the other, and that by reason of that faith such an one is further relied upon, goes a long way toward showing the latter transaction to be one arising from a confidential relationship. Where such relations are shown to exist, the burden of showing the good faith of the transaction is upon the one asserting it. 14 Am. & Eng. Ency. of Law (2d Ed.) 194."

In deciding this case upon appeal without reference to any precedent from the books, we think the court is right, as nothing could be gained by comparing the facts now before it with other facts in cases which are not analogous, and then try to harmonize the apparently conflicting decisions, which deal with those facts. As already stated, we have been unable to find anywhere a case where the facts are similar to those in the case at bar. The nearest to it is the case of *In re Shea*, 245 Fed. 363, decided by the District Court of Massachusetts in 1917. In that case, which was a review of the referee's decision, the facts were that the objecting creditors to the bankrupt's discharge had been carrying on transactions with the bankrupt as a broker, and as speculative margin accounts, according to the custom of brokers as found by the referee. Statements were rendered by the broker from time to time to his objecting creditors, or with his knowledge and approval, stating specifically there was "on hand" for them stock with the bankrupt or his company did not own and had no control for delivery of, and the referee found upon hearing of objections:

"The bankrupt did not in fact have any other stock of these descriptions at that time available, either in possession or by right of any contract, for delivery to the creditor, if payment had been made by the creditor and demand had been made for the stock."

We quote the court's language which is applicable to the case at bar:

"After these statements had been made to the creditor, payments to the bankrupt or his company were made by her. Each customer's account seems to have been treated as an entirety, and not as a series of unrelated purchases or sales of different stocks. Payments made subsequent to the statements, must, I think, be regarded as having been procured, in part, at least, by the showing of stock on hand for the customer. This fact is categorically stated by the learned referee. He says, however:

" 'The objecting creditors made payments to the bankrupt to be credited on the account, believing that the bankrupt was carrying on margin for them, respectively, the shares of stock recited in the last monthly statements of accounts as being on hand.'

"The creditor's belief that the bankrupt had the stocks on hand was undoubtedly one of the inducements to further payments by the creditor.

"It does not appear that the bankrupt understood that the statement that stocks on hand was false. But he knew what the facts were, and he knew

what was being represented to the customers, and he cannot escape responsibility for what was said upon the ground that he did not realize the legal effect of the language used. Nor does the fact, if it be so, that the bankrupt's *intention* was to buy and deliver shares, if the customer should call for them and pay the balance due, save the statements that shares were on hand from being false.

"The false statement, in order to bar discharge, must have been made for the purpose of obtaining money or credits. The creditor's stocks were carried on margin. If it became necessary to increase the margin, further payments might be made to the bankrupt or his company by her. In doing so, she would act, as both parties understood, in reliance on the statement. This was one of the reasons why it was made by the bankrupt or his company. It is not necessary that the sole purpose of the statement should have been to obtain money or credits. If that be one purpose, and the statement be known to be false, it is sufficient to bar a discharge."

In the above case the application for discharge was refused upon the grounds stated.

In *Re Feinberg*, 287 Fed. 254, District Court, Pennsylvania, statements were made to the bank for the purpose of obtaining loans upon promissory notes. Renewal notes were accepted from time to time and reduced, the old note being charged off

and credit given for the renewals. The special master recommended that the objections be dismissed because the notes held by the bank were renewal notes, and therefore were not accepted on reliance upon a materially false statement in writing. In sustaining the objections and disallowing the report of the Special Master, the court said:

"The Bankruptcy Act authorizes the judge to discharge the bankrupt unless he has, inter alia (section 14b) [3], 'obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person.' The bankrupt's discharge is not the primary purpose of the Bankruptcy Act, nor is it an absolute right of the bankrupt. It is a privilege the law extends to him, unless it is shown that he has done one or more of the things provided in section 14 as grounds for refusal of his discharge. The primary purpose of the act is to collect the assets of the bankrupt and distribute them fairly and equitably among his creditors."

We submit this petition for a rehearing of this case to the court, confidently believing that in view of the important questions raised therein it will be given a respectful consideration.

WHEREFORE, upon the foregoing grounds, these appellees and petitioners respectfully pray this honorable court for a rehearing of said case.

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Attorneys for Appellees and Petitioners.

I, Josiah Thomas, of counsel for the appellees and petitioners, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and the same is not interposed for delay.

JOSIAH THOMAS,
Of Counsel for Appellees and Petitioners.